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ARAB-MALAYSIAN FINANCE BHD v. RAZSHAH ENTERPRISES SDN BHD

COURT OF APPEAL, PUTRAJAYA
VERNON ONG LAM KIAT JCA
ABDUL RAHMAN SEBLI JCA
B HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEAL NO: A-02(W)-416-03-2015]
28 JANUARY 2016

C ***LAND LAW:*** *Sale of land – Order of court – Land charged to bank as security for loan – Default in repayment of loan – Allegation of new agreement – Whether loan agreement varied – Whether repayment period extended – Whether chargor allowed to redeem lands in staggered manner – Whether plaintiff breached agreement in refusing to allow redemption of lands – Whether cause to contrary shown – Whether chargor could counterclaim for damages – National Land Code, s. 256*

D The defendant was the owner of 53 lots of lands ('the said lots') held under separate documents of titles. Pursuant to a loan agreement, the plaintiff granted a term loan of RM2.4 million to one Wan Mokhtar ('borrower') secured by the defendant through a third party legal charge over the said lots. The borrower agreed to service the interest payments monthly and to repay
E the principal in one lump sum within two years of the drawdown. When the borrower defaulted in the repayment of the loan, the plaintiff issued a letter extending the expiry date of the loan period from 7 July 1985 to the end of September 1986 ('the first extension letter'). Since the borrower breached the loan agreement for the second time, the plaintiff issued another letter
F extending the loan period to 31 December 1987 ('the second extension letter'). Upon the defendant's failure to effect full payment of the outstanding sum, the plaintiff issued a final notice of demand and subsequently issued a statutory notice in Form 16D against the defendant. Pursuant to an originating summons ('OS') the plaintiff sought an order for sale of the said
G lots. The defendant, on the other hand, counterclaimed against the plaintiff on the ground that the plaintiff had wrongfully refused to discharge some parcels of land although amounts had been repaid to the plaintiff. The High Court rejected the plaintiff's application for order for sale on the existence of cause to the contrary and directed that the proceedings be continued as if
H it had been begun by writ. The High Court found, *inter alia*, that (i) there was no valid demand because the final notice of demand did not separately set out the actual amount of the late payment interest and overdue interest; (ii) the defendant could redeem the 53 lots individually and the outstanding balance of the loan sum will be reduced accordingly; and (iii) the plaintiff breached the amended loan agreement in wrongly withholding the

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documents of title when the defendant wanted to redeem the same. The High Court further allowed the defendant's counterclaim. Hence, the present appeal. The issues that arose for determination were (i) whether the final notice of demand and Form 16D were valid; and (ii) whether the plaintiff breached the agreement by not releasing the titles to the defendant as partial redemption.

Held (allowing appeal with costs)
Per Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) The calculations of the plaintiff on the amount due and owing under the loan were correct. The final notice of demand showed that the demand was for 'the whole of the principal amount of the loan, interest and all moneys covenanted to be paid ...'. There is no requirement in s. 254 of the National Land Code ('NLC') to separately itemise interest and default interest. In fact, s. 254(3) of the NLC also refers to the whole sum secured by the charge due and payable. In the circumstances, the final notice of demand and Form 16D which sets out the global amount due and owing on the loan and charge were sufficiently specific and valid. (paras 41 & 43)

(2) The defendant's argument was predicated on the oral representations by the plaintiff's branch manager that the titles would be redeemed if payments were made during the intervening periods. There was nothing in the appeal record to indicate that the payments were made to the plaintiff for the purpose of redeeming the titles. Further, the facts relating to the oral representations were not pleaded. In the circumstances, when the evidence represented a departure from the pleadings, it should be objected to when and where it was adduced. As such, the evidence that was adduced ought to have been expunged. Accordingly, the High Court misdirected itself by taking into consideration inadmissible evidence in holding that the borrower was entitled to redeem the titles during the intervening period. (paras 44, 45 & 47)

(3) There are only three categories of cases which constitute cause to the contrary under s. 256 of the NLC, namely, (i) where the charger is able to impeach the chargee's title to the charge on any ground provided under s. 340 of the NLC; (ii) where there is a failure on the part of the charge to meet the condition precedent for the making of an application for an order for sale; and (iii) where to grant an order for sale would contravene some rule of law or equity (*Low Lee Lian v. Ban Hin Lee Bank Bhd*). The defendant had failed to bring the facts of its case within these categories. As such, no cause to the contrary was established before the High Court. The defendant's counterclaim was accordingly set aside. (paras 50, 52 & 53)

Bahasa Malaysia *Headnotes*

Defendan adalah pemilik 53 lot tanah ('lot-lot tersebut') yang dipegang di bawah dokumen hak milik berasingan. Berdasarkan suatu perjanjian pinjaman, plaintif memberikan kemudahan pinjaman berjangka sebanyak RM2.4 juta kepada Wan Mokhtar ('peminjam') yang dijamin oleh defendan melalui gadaian pihak ketiga ke atas lot-lot tersebut. Peminjam bersetuju untuk membayar faedah bulanan dan untuk membayar jumlah prinsipal sekaligus dalam tempoh dua tahun selepas pengeluaran. Selepas kegagalan peminjam membuat pembayaran balik pinjaman, plaintif mengeluarkan surat melanjutkan tarikh tamat tempoh pinjaman dari 7 Julai 1985 hingga akhir September 1986 ('surat lanjutan pertama'). Apabila peminjam memungkiri perjanjian pinjaman untuk kali kedua, plaintif mengeluarkan satu lagi surat melanjutkan tempoh pinjaman sehingga 31 Disember 1987 ('surat lanjutan kedua'). Oleh kerana defendan gagal membuat bayaran penuh jumlah wang yang tertunggak, plaintif mengeluarkan notis tuntutan terakhir dan kemudian mengeluarkan notis statutori dalam Borang 16D terhadap defendan. Menurut suatu saman pemula ('OS') plaintif memohon untuk suatu perintah jualan lot-lot tersebut. Defendan pula membuat tuntutan balas terhadap plaintif atas alasan bahawa plaintif telah secara salah enggan melepaskan beberapa bidang tanah meskipun sejumlah wang telah dibayar balik kepada plaintif. Mahkamah Tinggi menolak permohonan plaintif untuk perintah jualan atas kewujudan sebab bertentangan dan mengarahkan supaya prosiding diteruskan seolah-olah dimulakan melalui writ. Mahkamah Tinggi mendapati, antara lain, bahawa (i) tidak terdapat tuntutan sah kerana notis tuntutan terakhir tidak menyatakan jumlah faedah bayaran lewat sebenar dan faedah tertunggak; (ii) defendan boleh menebus 53 lot secara individu dan baki tertunggak daripada jumlah pinjaman akan dikurangkan dengan sewajarnya; dan (iii) plaintif memungkiri perjanjian pinjaman dipinda apabila secara salah memegang dokumen hak milik apabila defendan hendak menebusnya. Mahkamah Tinggi selanjutnya membenarkan tuntutan balas defendan. Oleh itu, rayuan ini. Isu-isu yang dibangkitkan untuk pertimbangan adalah (i) sama ada notis tuntutan terakhir dan Borang 16D adalah sah; dan (ii) sama ada plaintif memungkiri perjanjian dengan tidak melepaskan hak milik kepada defendan sebagai penebusan separa.

Diputuskan (membenarkan rayuan dengan kos)

Oleh Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Pengiraan plaintif bagi amaun yang harus dibayar dan terhutang di bawah pinjaman adalah betul. Notis tuntutan terakhir menunjukkan tuntutan tersebut adalah untuk 'keseluruhan jumlah prinsipal pinjaman, faedah dan semua wang yang disetujui untuk dibayar ...'. Tidak ada keperluan dalam s. 254 Kanun Tanah Negara ('KTN') yang menyenaraikan faedah dan faedah ingkar secara berasingan. Malah, s. 254(3) KTN juga merujuk kepada keseluruhan jumlah yang dijamin

oleh gadaian yang terhutang dan kena dibayar. Dalam keadaan itu, notis tuntutan terakhir dan Borang 16D yang menetapkan jumlah global yang kena dibayar dan terhutang atas pinjaman dan gadaian adalah cukup spesifik dan sah.

(2) Hujahan defendan adalah berasaskan representasi lisan oleh pengurus cawangan plaintif bahawa hak milik akan ditebuskan jika bayaran dibuat dalam tempoh masa tersebut. Tiada apa-apa dalam rekod rayuan untuk menunjukkan bahawa bayaran telah dibuat kepada plaintif bagi tujuan menebus hak milik. Malahan fakta-fakta yang berkaitan dengan representasi lisan tidak diplidkan. Dalam keadaan ini, apabila keterangan adalah penyimpangan daripada pliding, ia harus dibantah apabila dan semasa dikemukakan. Oleh itu, keterangan yang dikemukakan sepatutnya dihapuskan. Mahkamah Tinggi tersalah arah apabila mengambil kira keterangan yang tidak boleh diterima dalam memutuskan bahawa peminjam berhak untuk menebus hak milik dalam tempoh masa tersebut.

(3) Terdapat hanya tiga kategori kes yang membentuk sebab bertentangan di bawah s. 256 KTN iaitu, (i) di mana penggadai berjaya mencabar hak pemegang gadaian atas mana-mana alasan seperti yang diperuntukkan di bawah s. 340 KTN; (ii) di mana terdapat kegagalan oleh pemegang gadaian untuk memenuhi syarat-syarat duluan bagi memfail permohonan perintah jualan; dan (iii) di mana membenarkan perintah jualan adalah bertentangan dengan mana-mana undang-undang ataupun ekuiti (*Low Lee Lian v. Ban Hin Lee Bank Bhd*). Defendan gagal membawa fakta kes dalam ruang lingkup kategori-kategori ini. Oleh itu, tiada sebab bertentangan dibuktikan di hadapan Mahkamah Tinggi. Tuntutan balas defendan diketepikan dengan sewajarnya.

Case(s) referred to:

Ang Koon Kau & Anor v. Lau Piang Ngong [1985] 1 CLJ 31; [1985] CLJ (Rep) 24 FC ***(refd)***

Dato' Hamzah Abdul Majid v. Omega Securities Sdn Bhd [2015] 9 CLJ 677 FC ***(refd)***

Hongkew Holdings (M) Sdn Bhd v. Hyundai Heavy Industries Co Ltd [2007] 5 CLJ 165 CA ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(foll)***

Superintendent Of Lands And Surveys, 4th Division & Anor v. Hamit Matusin & 6 Ors [1994] 3 CLJ 567 SC ***(foll)***

Syarikat Kewangan Melayu Raya v. Malayan Banking Bhd [1986] 1 LNS 98 PC ***(refd)***

Tengku Azman Tengku Adnan & Anor v. Hong Leong Bank Bhd [2014] 1 LNS 478 CA ***(refd)***

Waghorn v. George Wimpey & Co Ltd [1970] 1 All ER 474 ***(refd)***

Legislation referred to:

National Land Code, ss. 254(3), 256(3), 340

For the appellant - VJ Kumar, Krishna Dallumah & YH Yong; M/s Kumar Jaspal Quah & Aishah

For the respondent - Mark Foong, Asri Abas & Raam Kumaar; M/s Asri Chek Ming & Co

[Editor's note: For the High Court judgment, please see Arab-Malaysian Finance Bhd v. Razshah Enterprises Sdn Bhd [2015] 5 CLJ 1052 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] This appeal relates to the decision of the learned Judicial Commissioner (JC) of the High Court dismissing the plaintiff's claim for an order for sale and allowing the defendant's counterclaim for damages due to the plaintiff's breach of the loan agreement. In this judgment, the parties shall be referred to as they were in the court below.

The Salient Facts

[2] The defendant is the owner of 53 lots of land held under separate documents of title ("the 53 Lots"). The 53 Lots are undeveloped lands which are approved for commercial development.

[3] Pursuant to a loan agreement dated 6 July 1983, the plaintiff agreed to grant a term loan of RM2.4 million to one Wan Mokhtar bin Wan Endut ("the borrower") secured by the defendant through a third party legal charge over the 53 Lots.

[4] The borrower and his wife are the shareholders of the defendant company. The borrower was the Managing Director of the defendant company at the material time.

[5] The loan sum was disbursed to the borrower on 8 July 1983. Under the loan agreement, the borrower agreed to service the interest payments monthly and to repay the principal in one lump sum within two years of the drawdown, ie, by 8 July 1985.

[6] The borrower serviced the monthly interest payments from July 1983 until April 1984. The borrower failed to service the monthly interest payments for the period from May 1984 to May 1985.

[7] At the borrower's request, the plaintiff agreed to restructure the repayment of the principal sum. By a letter dated 7 October 1985 ("the first extension letter"), the terms of payment were revised on the following terms and conditions; the relevant portions of the first letter are reproduced below:

> ... The lump sum repayment scheduled on 8th July 1985 is to be revised as follows:

(i) Monthly servicing of interest.

(ii) Six principal repayments as per schedule below:

Principal Repayment ($)	Month End
200,000	November 1985
500,000	January 1986
500,000	March 1986
500,000	May 1986
500,000	July 1986
200,000	September 1986

or upon redemption of title whichever is earlier. In the event, any redemption is applied the subsequent principal repayments shall be reduced equally and accordingly.

The redemption sum of shophouses are (sic) at $65,000 per title.

[8] The borrower failed to comply with the revised payment schedule.

[9] By a letter dated 12 May 1986 addressed to the borrower and the defendant, the plaintiff demanded payment of the outstanding sum. Thereafter, the plaintiff received payments of various sums of money which were paid into the borrower's account between 31 October 1986 and 15 June 1987.

[10] At the borrower's further request, the plaintiff agreed to restructure the payment schedule on the following terms and conditions as contained in the plaintiff's letter dated 10 July 1987 ("the second extension letter"). The relevant portions of the second extension letter are reproduced below:

We refer to our Letter of Offer dated 28th May 1983 and thereafter letter dated 7th October 1985.

In response to your further request, we are pleased to inform you that our Board has agreed to extend the repayment due dates of the principal balance outstanding on the above facility as follows:

(i) Monthly servicing of interest on principal balance outstanding.

(ii) One lump sum repayment of principal outstanding on 31st December 1987 or upon redemption of shophouse titles whichever is earlier.

The redemption sum of shophouse titles shall be at RM65,000.00 per title.

Further, the interest rate has been reduced from fifteen per cent (15.0%) per annum on monthly rest to four and a half per cent (4.5%) above our Base Lending Rate currently pegged at nine and a quarter per cent (9.25%) or thirteen and three quarter per cent (13.75%) per annum on monthly rest hereinafter referred as the "Prescribed Rate" with effect from 1st may 1987.

A Similarly, damages on late payments (additional interest) is reduced from 0.05% per day to 0.0493% per day with effect from 1st February 1987. Thereafter effective 1st July 1987 it shall be three per cent (3.0%) above the "Prescribed Rate".

[11] By a letter dated 27 October 1987 addressed to the borrower, the B plaintiff informed that: (i) the overdue interest rate had been reduced from 24.0% to 18% for the period 1 July 1985 to 30 November 1985 and reduced to 16.0% per annum from 1 December 1985 to 31 January 1987, and (ii) that all other terms of the second extension letter remain unchanged.

[12] The borrower's last payment of RM100,000 to the plaintiff was made C on 23 November 1987.

[13] By a letter dated 29 April 1988 ("final notice of demand"), the plaintiff's solicitors demanded payment from the defendant the sum of RM1,218,629.84 owing as at 31 March 1988 together with interest at 14% per annum from 1 April 1988.

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[14] The defendant failed to effect full payment of the amount outstanding.

[15] On 27 May 1988, the plaintiff issued a statutory notice in Form 16D to the defendant requiring the defendant to remedy the breach within seven days failing which an order for sale would be applied for. The Form 16D E was served on the defendant on or about 30 May 1988.

[16] Pursuant to an originating summons filed on 9 July 1988 ("the OS"), the plaintiff obtained an order for sale for the 53 Lots on 10 May 1991. The order for sale was set aside by the Supreme Court on 27 April 1992 and the matter was remitted to the High Court to be heard before another judge.

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[17] Meanwhile, on 17 July 1992, the defendant filed a counterclaim against the plaintiff for breaches of the loan agreement.

[18] On 14 December 1992, the learned judge rejected the plaintiff's application for the order for sale on the ground that there was a cause to the G contrary. The learned judge also ordered that the proceedings be continued as if it was begun by writ.

[19] On 29 July 1997, the matter came up before another learned judge who ruled that the doctrine of *res judicata* applied and dismissed both the plaintiff's application for an order for sale and the defendant's counterclaim.

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[20] On appeal, the Court of Appeal remitted the plaintiff's writ action and the defendant's counterclaim to the High Court for hearing.

Findings Of The High Court

[21] In essence, the learned JC found that the plaintiff failed to prove the I amount claimed. The learned JC was satisfied that the defendant had shown the existence of cause to the contrary. On the defendant's counterclaim, the learned JC found that the plaintiff committed a fundamental breach in refusing the borrower's request to redeem the titles.

[22] The findings of the learned JC of the existence of cause to the contrary as contained in the judgment may be summarised as follows:

(a) There was no valid demand because the final notice of demand did not separately set out the actual figure of the late payment charge and overdue interest;

(b) As the second extension letter only extended the last date of the repayment from end September 1986 to 31 December 1987, the borrower is allowed to redeem the 53 Lots within the period from end September 1986 to 31 December 1987;

(c) The borrower or the defendant can redeem the 53 Lots individually and the outstanding balance of the loan sum will be reduced accordingly;

(d) The plaintiff breached the amended loan agreement when it wrongly withheld the documents of title when the borrower or the defendant wanted to redeem the same.

Plaintiff's Submission

[23] The plaintiff's appeal relates to the two key questions.

(i) whether the final notice of demand and the Form 16D are valid?; and

(ii) whether the plaintiff breached the agreement by not releasing the titles to the defendant as partial redemption?

[24] On issue (i), learned counsel for the plaintiff submitted that the borrower's obligation to pay the late payment charges is set out under ss. 3.06 and 9.01 of the loan agreement. It provides that the borrower shall pay the late payment charges on demand. There is no requirement that the amount be separately demanded. Clause 6(a) of the charge annexure also provides that the outstanding sums shall be repayable on demand. There is also no such requirement under the charge. The learned JC erred in failing to consider the specific notice for overdue interest contained in the plaintiff's demand letter to the borrower dated 29 April 1985.

[25] The final notice of demand addressed to the defendant was a demand for the total amount outstanding. At the trial, the defendant called their own expert witness DW3. DW3 agreed that the notice of demand dated 29 April 1985 constituted a valid demand under s. 3.06 of the loan agreement and that as overdue interest was payable.

[26] In addition, it is not the defendant's pleaded case that the overdue interest must be stated as a separate item in the notice of demand. As such, the learned JC decided on a point that was not pleaded. In support of their submission, learned counsel cited the Privy Council's decision in *Syarikat Kewangan Melayu Raya v. Malayan Banking Bhd* [1986] 1 LNS 98; [1986] 2 MLJ 253 and two other decisions of the Court of Appeal in *Tengku Azman*

A *Tengku Adnan & Anor v. Hong Leong Bank Bhd* [2014] 1 LNS 478; [2015] 2 MLJ 139, 148, and *Hongkew Holdings (M) Sdn Bhd v. Hyundai Heavy Industries Co Ltd* [2007] 5 CLJ 165; [2007] 5 MLJ 762, 765.

[27] Notwithstanding the aforesaid, the learned JC's finding that the plaintiff failed to prove the amount claimed in the Form 16D is contrary to the evidence. Once the Form 16D is correct and the defendant *qua* chargor does not pay, the learned JC ought to have granted the order for sale and considered the counterclaim.

[28] On issue (ii), it was submitted that the initial loan was a term loan with a bullet repayment of two years. As the loan was drawn-down on 8 July 1983, the repayment date was 8 July 1985. The borrower defaulted and at the borrower's request the plaintiff issued the first extension letter whereby the loan was extended to end of September 1986. The borrower was allowed to make partial redemption of the 53 Lots. However, the borrower failed to make any payments and the learned JC correctly found that the offer contained in the first extension letter lapsed and was no longer valid.

[29] Meanwhile, during the intervening period when the first extension letter lapsed and the second extension letter was granted, the borrower made substantial payments amounting to more than RM2 million; by then the amount outstanding on the loan had already risen to about RM4 million.

[30] Learned counsel argued that the payments made by the borrower during the intervening period did not revive the first extension letter so as to entitle the borrower or the defendant to redeem the titles. The first extension letter and second extension letter are separate and the second extension letter does not revive the first extension letter. The finding that the effect of the second extension letter is to allow the borrower to redeem the titles between the intervening period is not supported by the evidence. First, the payments were made after the first extension letter had lapsed. Second, the borrower in his testimony admitted that he made the payments after the offer in the first extension letter had lapsed.

[31] Notwithstanding the aforesaid, the borrower argued that he relied on an oral representation by the plaintiff's Branch Manager that he could redeem the titles. The borrower admitted in evidence that the Branch Manager had no authority to act on his own but had to refer the matter to headquarters. Further, there was no pleaded case of any oral representation by the plaintiff's Branch Manager. As such, the point ought not to have been considered. In addition, at the time the payments were made without any request for redemption of the titles. As such, the learned JC misdirected himself by taking inadmissible evidence into consideration.

[32] Learned counsel also argued that the learned JC construed the reference in the first paragraph of the second extension letter to the letter of offer dated 28 May 1983 and the first extension letter to mean that the

plaintiff had thereby revived the first extension letter. The learned JC erred in reading between the lines as it is not in accordance with the canons of interpretation. The borrower was only entitled to redeem the titles after the second extension letter and not before. There is no reference in the second extension letter to the payments made by the borrower. The second extension letter relates to future conduct.

Defendant's Submission

[33] On issue (i), learned counsel for the defendant submitted that the charge annexure and the loan agreement must be read together. The loan agreement provides under s. 3.04 that the plaintiff must give written notice of any variation of the interest rate to the borrower. In this case, no written notice was given to the borrower. As such, the Form 16D is also defective as it did not set out the variation of the interest rate as required by s. 3.04.

[34] It was also argued that the loan agreement was terminated 14 days after the borrower issued his letter of demand dated 27 November 1987. Consequently, the charge was also terminated or invalidated. As a result, the Form 16D which was based on the charge had become invalid and ineffective. It follows that an order for sale cannot be granted because of the existence of a cause to the contrary under s. 256(3) of the National Land Code (NLC).

[35] On issue (ii), learned counsel for the defendant submitted that the first extension letter is a continuation of the loan and not a fresh offer. Under the second extension letter, the plaintiff agreed to extend the repayment due date of the principal balance outstanding sum to 31 December 1987 or upon redemption of the 53 Lots whichever is earlier. Similarly, the second extension letter is also an extension of the loan. In this connection, learned counsel also referred to the plaintiff's letter to the borrower dated 27 October 1987 informing of a reduction of the overdue interest rate and which also stated that all the other terms in the second extension letter remain unchanged.

[36] No notice of demand was issued by the plaintiff during the intervening period when the payments were made by the borrower. The fact that the payments include principal and interest was conceded by counsel for the plaintiff at the hearing of the appeal before the Supreme Court on 27 April 1991. Further, the plaintiff's witnesses have confirmed that there is no suspense account into which the payments were kept. The payments were treated as settlement of the outstanding balance principal and interest. As such, the borrower was never in breach of the loan agreement. Having paid about RM2.5 million during the intervening period, at least 18 to 19 titles should have been redeemed but the plaintiff refused to redeem any of the titles.

[37] Learned counsel also argued that the plaintiff accepted that the borrower was entitled to redeem the titles so long as payments were made. He referred to the plaintiff's internal memorandum dated 24 April 1987 on the borrower's loan account which refers to the redemption of individual titles at RM65,000 per title. Learned counsel submitted that the borrower did ask for the titles from the Branch Manager orally and in writing. He referred to two letters. The first letter is an undated letter purportedly received by the plaintiff on 6 August 1987. The second letter is dated 27 November 1987 giving the plaintiff 14 days deadline to release the titles. There was no reply to the two letters.

[38] Learned counsel conceded that the facts on the oral representations of the Branch Manager were not pleaded. At any rate, the plaintiff is not prejudiced by the omission. The defendant's witness statements were given to the plaintiff before the trial. The plaintiff did not apply to expunge the portions relating to the oral representations. The plaintiff had the opportunity to call the Branch Manager to testify but they did not. Even if the Branch Manager's evidence is disregarded, there is sufficient evidence to show that the plaintiff agreed to redeem the titles on payment.

Decision

[39] In this appeal, the primary issues to be determined relate to: (i) the validity of the Form 16D notice, (ii) the question of whether the borrower and; or the defendant was entitled to redeem the titles, and if, whether the plaintiff committed a breach of the loan agreement and charge annexure in failing to deliver up the titles and (iii) whether on the factual material the defendant has shown the existence of cause to the contrary to defeat the plaintiff's application for an order for sale.

Whether The Form 16D Is Valid?

[40] We note from the judgment of the learned JC that the calculations of the plaintiff of the amount due and owing under the loan were correct. However, the learned JC held that the final notice of demand is bad as it did not spell out the late payment charges separately. If the final notice of demand is bad, then the Form 16D will also be tainted as it did not spell out the late payment charges separately.

[41] A perusal of the final notice of demand will show that the demand was for "the whole of the principal amount of the loan, interest and all monies covenanted to be paid …" . In this connection, it is pertinent to refer to s. 254 of the NLC relating to the service of default notice pursuant to a charge. We note that there is no requirement in s. 254 to separately itemise interest and default interest. In fact, sub-s. 254(3) also refers to the whole sum secured by the charge due and payable.

[42] In *Syarikat Kewangan Melayu Raya v. Malayan Banking Bhd (supra)* a single notice of demand was issued citing two charges and lumping together the sums due under both charges. In that case, it was argued that the single notice is invalid because it fails to specify in relation to each charge the sum which is secured by that charge the failure to pay which constitutes the breach relied on. The Privy Council held that the specification of the global amount due on the single account secured by both charges cannot possibly have the effect of rendering insufficiently specific that which would have been sufficiently specific without any reference at all to the actual amount. The Privy Council also took the view that a Form 16D notice following a letter of demand which referred to the breach simply as a failure to repay the principal and interest secured by the charge would be a sufficient specification.

[43] Applying the principles enunciated above, we hold that the final notice of demand and Form 16D which sets out the global amount due and owing on the loan and charge are sufficiently specific and are therefore valid. As such, we do not agree that the final notice of demand and the Form 16D was prejudicial to the borrower or the defendant in any way.

Whether The Plaintiff Breached The Agreement By Not Releasing The Titles To The Defendant As Partial Redemption?

[44] The defendant's argument is predicated principally on the oral representations by the plaintiff's branch manager that the titles would be redeemed if payments were made during the intervening period. There is nothing in the appeal record to indicate that the payments were made to the plaintiff for the purpose of redeeming the titles. Learned counsel for the defendant also referred to three documents to support his argument. The first is the plaintiff's internal memorandum dated 24 April 1987. We note that the wordings of the relevant portion of the memorandum in question are similar to that in the first extension letter. As such, nothing turns on this document. The second document is the undated letter which was purportedly received by the plaintiff on 6 August 1987. The third is a letter dated 27 November 1987 from the borrower demanding that the plaintiff release the titles within 14 days failing which the loan agreement will be terminated. Both letters were purportedly written by the borrower on the basis and in reliance of the oral representation of the Branch Manager.

[45] In this instance, the facts relating to the oral representation were not pleaded. The fact that counsel for the plaintiff objected to the evidence relating to the same at the trial when the evidence was adduced has been confirmed by learned counsel for the defendant before us. In this connection, we would allude to the decision of the former Supreme Court in *Superintendent of lands and Surveys, 4th Division & Anor v. Hamit Matusin & 6 Ors* [1994] 3 CLJ 567; [1994] 3 MLJ 185, where Peh Swee Chin SCJ, later FCJ said at pp. 571-572 (CLJ); p. 190 (MLJ):

> Generally, in civil cases only, both parties can validate any mode of adducing evidence by consent, express or inferred, even when such mode is irregular, for any irregularity is deemed to be waived by such consent. Technical rules of evidence can be to a limited extent, even dispensed with by a court without such consent, please see *Baerlein v Chartered Mercantile Bank* [1895] 2 Ch 488; similarly with technical rules of procedure. Therefore, when such evidence represents a departure from pleadings, it should be objected to as when and where it is adduced, and it will be too late when it only objected to later on, as in the final submission at the close of the evidence in the instant appeal. In these circumstances, the party facing such evidence at variance from the pleadings, by failing to object, cannot be said to be taken by surprise, prejudiced, misled or embarrassed. Otherwise, the other side of the coin would be, in the event of such an objection raised at the stage of final submission being accepted by the court, that the party adducing such evidence may face the great risk of being denied leave to amend his pleadings in question at that stage.

[46] In essence, the principle relating to evidence which departs from pleaded material facts is this: When the evidence represented a departure from the pleadings, it should be objected to when and where it was adduced. Any objection made later on, as in the final submission at the close of the evidence will be too late and ineffective. Subject to one important exception, such evidence, when given without any objection by the opposing party, will further have the effect of curing the absence of such a plea in the pleadings, so as to overcome such defect in the pleading (see *Ang Koon Kau & Anor v. Lau Piang Ngong* [1985] 1 CLJ 31; [1985] CLJ (Rep) 24; [1984] 2 MLJ 277 at p. 278). The exception applies where the evidence represents a radical departure from the pleadings, and is not just a variation, modification or development of what has been alleged in the pleadings in question (see *Waghorn v. George Wimpey & Co Ltd* [1970] 1 All ER 474; *Dato' Hamzah Abdul Majid v. Omega Securities Sdn Bhd* [2015] 9 CLJ 677; [2015] 6 AMR 613).

[47] Applying the above cited principles to the facts of this case, we take the view that the evidence that was adduced ought to have been expunged. Accordingly, the learned JC misdirected himself by taking into consideration inadmissible evidence in holding that the borrower is entitled to redeem the titles during the intervening period.

Whether The Defendant Has Shown The Existence Of Cause To The Contrary?

[48] We will now address the defendant's contention that the borrower was never in breach of the loan agreement as no notice of demand was issued by the plaintiff to the borrower or defendant during the intervening period. We agree with the submission of learned counsel for the plaintiff that no notice of demand was issued because the second extension letter granted the borrower an extension until 31 December 1987 to pay the outstanding principal balance and interest. Notices of demand were only issued after the deadline had expired.

[49] At this juncture, it must be emphasised that in this action the plaintiff is applying for an order for sale pursuant to s. 256 of the NLC. Subsection 256(3) provides that the court shall order the sale of the land unless it is satisfied of the existence of cause to the contrary.

[50] In *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36, the Federal Court held that there are only three categories of cases which constitute cause to the contrary under s. 256 of the NLC. They are: (i) where the chargor is able to successfully impeach the chargee's title to the charge on any of the grounds provided under s. 340 of the NLC; (ii) where there is a failure on the part of the chargee to meet the conditions precedent for the making of an application for an order for sale; and (iii) where to grant an order for sale would contravene some rule of law or equity.

[51] In *Tengku Azman Tengku Adnan & Anor v. Hong Leong Bank Bhd (supra)*, it was contended that (i) the bank had increased the monthly repayment sums without the borrowers' consent; (ii) the borrowers were not informed of the increase in the interest rate; (iii) the balance outstanding sums were excessive; and (iv) the bank were in breach of the banking facility agreement when it was wrongfully terminated. In that case, the Court of Appeal held that (i) the bank was not in breach of the banking facility agreement when it increased the interest rates; (ii) the borrowers' contention that they were charged excessive interest rates had no merit; (iii) the bank had made a proper demand for payment of the outstanding sums through its solicitor's letter and the Form 16D was properly served on the borrowers/ chargors; and (iv) in a foreclosure action, challenges on the calculation of interest under the loan agreement are actually not relevant. The court should only be concerned with the restrictive categories of "cause to the contrary" as laid down in *Low Lee Lian (supra).*

[52] In this instance, we are satisfied that the learned JC's finding that the plaintiff breached the loan agreement is not supported by the evidence. Further, the defendant has plainly failed to bring the facts of its case within any of these categories. As such, no cause to the contrary was established before the High Court.

[53] As the defendant's counterclaim is dependent on the finding of liability, we would also set aside the decision of the learned JC allowing the counterclaim.

[54] In consequence of the foregoing reasons, the plaintiff's appeal is allowed with costs. The decision of the High Court is set aside. The plaintiff's claim in prayers (1), (2), (3), (4), (5) and (6) of the amended statement of claim dated 7 June 2011 are allowed. The defendant's counterclaim is dismissed.